IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:05.12.2007

CORAM

THE HONOURABLE Mr. JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Civil Revision Petition (NPD) No.2490 of 2004
and
C.M.P.No.18729 of 2004

Haji M.A.Ahmed Sadakathullah Maraicair .... Petitioner

.Vs.

1. A.Mohideen Abdul Khader
2. Haji A.Hassan Abdul Khader Maraicair
3. Sayeed Aisha Fathima Nachiar
4. Hafsa Ammal
5. Canara Banj, Nagapattinam
   represented by its Branch Manager
   Neela East Street, Nagore
   Nagapattinam Town, Taluk and Munsiff
6. Indian Bank, Nagapattinam
   represented by its Branch Manager
   Nethaji Road, Nagapattinam Town, Taluk
7. State Bank of India, Nagapattinam
   represented by its Branch Manager
   Neela South Street, Nagapattinam Town
8. Ummal Salma Nachiar
9. Mohammed Zackria Maraicair
10. Hameed Fathima Nachiar
11. Jager Sadhik Maraicair
12. Abul Hassan Sadhuli Maraicair
13. Jeyanambu Nachiar
14. Hajira Julaika Nachiar
15. Sayeed Sultani Nachiar
16. Khader Mohideen Maraicair

Since the respondents 5,6 and 7 are considered as unnecessary parties, no notice need be given to the said respondents .. Respondents

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Civil Revision Petition is filed under Section 115 of C.P.C. against the dismissal order dated 8.12.2003 on the file of Principal Subordinate Court, Nagapattinam made in I.A.No.314 of 2003 in I.A.No.87 of 2002 in O.S.No.60 of 1981.

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For Petitioner : : Mr.Jemmy Vasanth
For respondents : : Mr.Srinath Sridevan,Advocate-R1
Mr.P.Valliappan,Advocate-R2
R5 to R7-Given up
RR3,4, 8 to 16 notice served

O R D E R

The third plaintiff in O.S.No.60 of 1981 on the file of the Principal Subordinate Judge, Nagapattinam had challenged the order passed in in I.A.No.314 of 2003 in I.A.No.87 of 2002 in O.S.No.60 of 1981. I.A.No.314 of 2003 in I.A.No.87 of 2002 in O.S.No.60 of 1981 was filed by the 4th plaintiff in O.S.No.60 of 1981. The plaintiffs have filed the suit in O.S.No.60 of 1981 for partition of the plaint schedule properties. After passing of the preliminary decree, final decree proceeding was initiated by the plaintiffs in I.A.No.87 of 2002 in O.S.No.60 of 1981. While the said final decree proceeding is pending before the Principal Subordinate Judge, Nagapattinam, the 4th plaintiff alone had filed I.A.No.314 of 2003 under Order 6 Rule 17 of CPC to amend his share in the preliminary decree as 12/60 instead of 10/60 on the ground that his mother/4th defendant died, after passing of the preliminary decree in whose favour a preliminary decree for 10/60th share has been declalred. According to the petitioner/4th plaintiff in I.A.No.314 of 2003, after the death of his mother, he became entitled to 12/60th share in the suit property as one of the legal heirs of 4th defendant. The said application has been contested by one of the plaintiffs viz., Haji M.A.Ahmed Sadakathullah Maraicair/3rd plaintiff on the ground that the deceased mother of the 4th plaintiff had executed a settlement deed dated 9.8.1982 conveying 15/60th share in favour of the third plaintiff. The learned Principal Subordinate Judge, Nagapattinam had allowed the application filed by the 4th plaintiff which necessitated the third plaintiff to prefer this revision.

2. The learned counsel appearing for the second respondent relying on the following decisions reported in Parashuram Rajaram-vs-Hirabai Rajaram Tiwari(AIR 1957 Bombay 59 ,Phoolchand -vs- Gopal Lal(AIR 1967 Supreme Court 1470),Hanumantappa Dyamappa Jadar-v- Mallavva (AIR 1996 Karnataka 183, Krihnabai-v- K.A.Krishnamurthy(2004)1 MLJ 91) and K.K.Kumar-v High Court of Gujarat through Registrar(AIR 2006 Supreme Court, 3559) contended that decree can be amended under Order 6 Rules 17 and 18 and under Section 151 CPC. I am of the view that unless a preliminary decree is passed in respect of 12/60th share in favour of the petitioner in IA.No.314 of 2003/4th plaintiff, the share already declared in the preliminary decree cannot be amended. It is pertinent to note that there are five plaintiffs to the suit in O.S.No.60 of 1981. The 4th plaintiff has

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admitted in I.A.No.314 of 2003 itself that he is one of the heirs of the deceased 4th respondent Haji Hameed Kathija Nachiar/5th plaintiff in O.S.No.60 of 1981.If it is so, then the other plaintiffs who are the other sons of 4th respondent Haji Hameed Kathija Nachiar/5th plaintiff in O.S.No.60 of 1981 are also entitled to an equal share of 12/60th each in the plaint schedule property. I am of the view that unless the petitioner/4th plaintiff's share is declared as 12/60 by way of passing of a preliminary decree, the decree already passed in O.S.No.60 of 1981 cannot be amended under Order 6 Rule 17 CPC. This settled proposition of law has been reiterated in Phoolchand -vs- Gopal Lal(AIR 1967 Supreme Court 1470),referred to above as follows:

> " So far as partition suits are concerned, if an event transpires after the preliminary decree which necessitates a change in shares, the Court can and should do so; and if there is a dispute in that behalf, the order of the Court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. However, this can only be done solong as the final decree has not been passed"

Admittedly, in this case also final decree is yet to be passed. The remedy open to the second respondent is to file a petition for passing another preliminary decree declaring his share along with other plaintiffs' share and then to proceed with the final decree proceedings.

3. The learned counsel appearing for the second respondent relying on a decision reported in Parashuram Rajaram-vs-Hirabai Rajaram Tiwari(AIR 1957 Bombay 59 (V44 C 25 Feb),referred to above, would contend that a preliminary decree in a suit for partition can be amended. The ratio decidenti in the said suit is that after passing a preliminary decree for partition, the plaintiff applied to the Court on the ground of his father's death, his share was augmented and the share which was 1/8th was increased to 1/7th. The said application was rejected and in an appeal it was held that the plaintiff would not be required to pay upon the footing of his augmented share. No question of paying ad valorem court-fees arose. It was only when a decree was passed in his favour increasing his share from 1/8th to 1/7th the plaintiff would be called upon to pay the amount of stamp duty upon the difference between his increased share which was 1/7th and the 1/8th share which was awarded to him by the preliminary decree.

4. The learned counsel for the second respondent at this juncture relying on a decision reported in Nanja Naicken-v- Rangammal(AIR 1972 Madras 384) and contended that a preliminary decree can be amended by way of a petition under Order 6 Rule 17 CPC. But the circumstances under which

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the application filed under Order 6 Rule 17 CPC in that case was that while drafting the preliminary decree, the share of the 6th defendant was omitted to be mentioned in the preliminary decree which was ordered to be rectified by way of a petition under Order 6 Rule 17 of CPC. So the facts in Nanja Naicken-v- Rangammal(AIR 1972 Madras 384) is not applicable to the present facts of the case.

5. In fine, the revision petition is allowed and the order passed in I.A.No.314 of 2003 in I.A.No.87 of 2002 in O.S.No.60 of 1981 is hereby set aside. The remedy open to the second respondent/4th plaintiff is to file necessary application, before the said Court wherein the final decree application in I.A.No.87 of 2002 is pending to declare his share and the shares of the other plaintiffs for passing another preliminary decree before passing final decree. No costs. Consequently, connected C.M.P.No.18729 of 2004 is closed.

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Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1. The Principal Subordinate Judge, Nagapattinam
2. The Section Officer, V.R.Section, High Court, Madras.

+ One cc to Mr. Jemmy Vasanth, Advocate Sr 71978
+ One cc to Mr. P. Valliappan, Advocate sR 71885

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